J. Frank Staley
v a McCloskey

266

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923. [redacted] 1924

No. [redacted]42

JAMES SHEWAN & SONS, INC., APPELLANT,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED APRIL 14, 1923.

"to employee

(29,547)

Suit in admiralty Act

291 F 713

What is the meaning of the phrase "is employed" in Section 2 Part 2 of Admiralty Act? Why should the fact that the vessel is laid up at the moment of the tort be controlling? It is the character

(29,547)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 997.

JAMES SHEWAN & SONS, INC., APPELLANT,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 21, 1923.

1 **UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.**

JAMES SHEWAN & SONS, INC., Libelant,

against

UNITED STATES OF AMERICA, Respondent.

Certificate of Jurisdictional Question.

SOUTHERN DISTRICT OF NEW YORK, ss:

I hereby certify that the above entitled cause is one in which the jurisdiction of the court is in issue, and that the decree dismissing the libel herein upon exception thereto is based solely on the ground that, the action being brought in admiralty, the libel does not set forth a cause of admiralty and maritime jurisdiction and that, treating the exceptions and the exceptive allegation of the United States of America as presenting the question of jurisdiction within the Suits in Admiralty Act of March 9, 1920, Chapter 95, 41 Statutes at Large 525, and no other question, the court, without having occasion to consider the merits, has adjudged that the District Court of the United States has no jurisdiction herein.

This certificate is made conformably to Section 238 of the Judicial Code to be sent up as part of the proceedings.

Dated this 26th day of March, 1923. Augustus N. Hand, United States District Judge for the Southern District of New York.

2 **Libel.**

To the Honorable the Judges of the United States District Court for the Southern District of New York.

The Libel and Complaint of James Shewan & Sons, Inc., against The United States of America in a cause of contract, civil and maritime, respectfully shows:

First. That your libelant now is and at all of the times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of New York.

Second. That the steamer "Biran" is owned by the United States of America and at all the times herein mentioned was engaged in mercantile trade.

Third. That heretofore and during the month of May, 1920, libelant at the special instance and request of the master, owner, agent or person in charge of the steamer "Biran", performed certain work, labor and services for said steamship, all of the fair and

reasonable value of Nine hundred three and 03 100 ($903.03) Dollars; that all of the said materials and supplies were fit, proper and necessary for said vessel and were furnished upon the credit of said vessel.

Fourth. That although libelant has duly demanded payment of the aforesaid sum, the same has not been paid, nor has any part thereof been paid, and the same by the maritime law and the Statutes of the United States of America and the laws of the State of New York became and now is a lien upon said vessel, her engines, boilers, tackle, apparel and furniture.

Fifth. That said vessel "Biran", her engines, boilers, tackle, apparel and furniture, is now within the jurisdiction of the United States and of this Honorable Court.

Sixth. That the United States of America has agents or officers residing and having a place of business within the jurisdiction of this Court, and has property therein.

Seventh. That the foregoing lien is such as could ordinarily be enforced in admiralty by proceeding in rem against the vessel "Biran".

Eighth. That under and by virtue of certain Statutes of the United States, approved by the President of the United States, it is provided that in matters of claim such as the foregoing, suit may be brought in admiralty against the United States in the jurisdiction where the libelant resided or had its principal place of business and this action is brought under the provisions of said Statutes.

Ninth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore libelant prays that citation in due form of law may issue against the respondent herein, citing it to appear and answer all and singular the matters aforesaid, and that libelant may have judgment for the amount of its claim aforesaid, with interest and costs, and have such other and further relief in the premises as to the Court may seem just. Foley & Martin, Proctors for Libelant, 61 Wall Street, New York City.

STATE OF NEW YORK,
County of New York, ss:

James A. Martin, being duly sworn, deposes and says, that he is a member of the firm of Foley & Martin, Proctors for the Libelant herein; that he has read the foregoing Libel and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

That the reason this verification is made by deponent is that libelant is not within the jurisdiction of this Court.

That the sources of deponent's information and the grounds of his belief as to all matters not stated in the Libel to be alleged upon

his own knowledge, are reports made to him by employees, together with records of said corporation. J. A. Martin.

Sworn to before this 12th day of May, 1922. Eva Gilmartin, Notary Public, New York County No. 117, Reg. No. 3229. Certificate Filed in Bronx County No. 15, Reg. No. 46. Kings County Clerk's No. 25, Reg. No. 3111. Queens County Clerk's No. 280, Commission Expires March 30, 1923.

6 District Court of the United States, Southern District of New York.

[Title omitted.]

Exceptions to Libel.

The respondent, United States of America, by its proctor, William Hayward, United States Attorney for the Southern District of New York, appearing herein specially for the sole purpose of objecting to the jurisdiction of this Court, and not otherwise, excepts to the libel of James Shewan & Sons, Inc., in a cause of contract, civil and maritime, upon the following grounds:

First. In that it is not alleged that at the date of the filing of the original libel herein, the steamship "Biran" was employed as a merchant vessel.

Exceptive Allegations.

Second. That on the 11th day of June, 1921, the steamship "Biran" was withdrawn from merchant service and laid up in the Hudson River at Cornwall, in the State of New York, and that ever since said last mentioned date said steamship has been and still is withdrawn from merchant or any other service and will continue to be so withdrawn from such service, and that since said 11th day of June, 1921, said steamship "Biran" has not been used, operated or employed as a merchant vessel, and that at the time of the filing of the libel herein, the said steamship "Biran" was not used, operated or employed as a merchant vessel by this respondent,
7 or by any other person, firm or corporation in its behalf or otherwise; that since said 11th day of June, 1921, said steamship "Biran" has carried no crew nor cargo, and since said date has been, now is and will for an indefinite period continue to be laid up and withdrawn from merchant or other service, and that during all of said time said steamship "Biran" has been, now is and will continue to be laid up in the Hudson River as aforesaid in the care of respondent's care takers with the out of use and laid up fleet of the respondents, at the place aforesaid, and said vessel has not been since said date the subject of any operating agreement for use in the merchant service nor is it contemplated to use said vessel

in the merchant service by this respondent or any other person, firm or corporation.

Wherefore, respondent prays that the libel may be discontinued. William Hayward, United States Attorney for the Southern District of New York, Proctor for Respondent. Appearing specially and not otherwise. Office & Post Office Address: Room 700, 15 Broadway, Borough of Manhattan, City of New York.

8 At a Stated Term of the District Court of the United States of America for the Southern District of New York held at the court rooms thereof, in the Post Office building, Park Row, Borough of Manhattan, City and State of New York, on the 26 day of March, 1923.

Present: Honorable A. N. Hand, District Judge.

[Title omitted.]

Order Dismissing Libel for Want of Jurisdiction.

This matter having come on to be heard on the libel and the exceptions and exceptive allegations filed thereto, the libellant being represented by Foley & Martin, its proctors, George V. A. McCloskey, advocate, and the respondent by its proctor William Hayward, United States Attorney for the Southern District of New York, by Walter Schaffner, Special Assistant United States Attorney, it is

Ordered that the said libel be deemed amended so that article Second thereof shall read as follows:

"Second. That the steamship "Biran" is owned by the United States of America, and at all times hereinafter mentioned was employed as a merchant vessel."

and it is further

Ordered that the exception and exceptive allegation filed against said libel be deemed filed against, and stand as to said libel as now amended.

And thereupon said exception and exceptive allegation having been duly argued by the respective counsel, and counsel for
9 the libellant having admitted in open court that on the 11th day of June, 1921, the steamship "Biran" was laid up in the care and custody of caretakers employed by the United States Shipping Board, in the out of use and laid-up fleet of the United States Shipping Board anchored in the Hudson River near Cornwall, New York, within the Southern District of New York, and so remained at and ever since the time when the libel was filed herein, and that ever since said 11th day of June, 1921, the said steamship "Biran" has carried neither crew nor cargo, nor been the subject of any op-

erating agreement for use in the merchant or other service, nor been transferred by the United States Shipping Board to any other department or agency of the Government of the United States, thereupon it is

Ordered that the exception and exceptive allegation filed to the said libel as amended be and the same hereby are sustained. And it is further

Ordered, adjudged and decreed that the said amended libel be and the same hereby is dismissed solely for want of jurisdiction. Augustus N. Hand, U. S. D. J.

Notice of settlement waived. Foley & Martin, Proctors for Libelants. William Hayward, Proctor for Respondent.

10 United States District Court for the Southern District of New York.

[Title omitted.]

Assignments of Error.

The libelant above named prays an appeal from the final decree of this court to the Supreme Court of the United States, and assigns for error:

1. That the court erred in holding that it was without jurisdiction in admiralty of the cause of action alleged in the libel.

2. That the court erred in holding that it was without jurisdiction in admiralty over the respondent under the Suits in Admiralty Act of March 9, 1920.

3. That the court erred in holding that it did not have jurisdiction in admiralty in the cause for as much as the steamship "Biran" was laid up at the time the libel was filed herein.

4. That the court erred in holding that it was without jurisdiction in admiralty of the cause because of the matters of fact recited in the decree.

5. That the court erred in holding that it was without jurisdiction in admiralty of the cause by reason of the exceptive allegation of the respondent.

6. That the court erred in sustaining the exception to the libel.

11 7. That the court erred in holding that the exceptive allegation set forth facts rendering the Suits in Admiralty Act of March 9, 1920, inapplicable to the cause of action set forth in the libel.

8. That the court erred in holding that the respondent had not given its consent to be sued in this cause.

9. That the court erred in dismissing the libel. Foley & Martin, Proctors for Libelant.

12 United States District Court, Southern District of New York.

[Title omitted.]

Petition for and Order Allowing Appeal.

The above named libelant, conceiving itself aggrieved by the decree made and entered herein on the — day of March, 1923, hereby appeals from said decree to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 26th day of March, 1923. Foley & Martin, Proctors for Libelant.

The foregoing claim of appeal is hereby allowed. Augustus N. Hand, United States District Judge.

13 **Citation and Service.**

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at the City of Washington, within thirty days from the date of this writ, pursuant to an appeal duly allowed by the District Court for the Southern District of New York, filed in the Clerk's Office of said Court on the 26th day of March, A. D. 1923, in a cause wherein James Shewan & Sons, Inc., is appellant and you, appellee, to show cause, if any, why the decree rendered against said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William Howard Taft, Chief Justice of the United States, this 26th day of March, A. D. 1923. Augustus N. Hand, Judge of the District Court of the United States for the Southern District of New York.

Service of a copy of the foregoing citation is hereby admitted this 26th day of March, 1923. William Hayward, United States Attorney, Proctor for Respondent.

11 United States District Court for the Southern District of New York.

[Title omitted.]

Stipulation as to Record.

It is hereby stipulated and agreed that the foregoing papers are all the papers necessary to be presented to the court on the appeal herein, to-wit:

1. Certificate of jurisdictional question.
2. Libel.
3. Exception and exceptive allegation of the United States of America.
4. Final decree.
5. Assignments of error.
6. Petition for leave to appeal and order allowing appeal.
7. Citation.

And it is further stipulated and agreed that the foregoing are true copies of the said papers in the above entitled matter as agreed upon by the parties.

Dated March 30, 1923. Foley & Martin, Proctors for Libelant. William Hayward, United States Attorney, Proctor for Respondent.

15 United States District Court for the Southern District of New York.

[Title omitted.]

Clerk's Certificate.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the foregoing is a correct copy of the transcript of the record of the said District Court in the above entitled matter, as agreed on by the parties.

In testimony whereof I have caused the Seal of the said Court to be hereunto affixed at the City of New York in the Southern District of New York, the 31st day of March, 1923, in the year of our Lord One thousand nine hundred and twenty three and of the Independence of the United States the One hundred and forty seventh. Alex. Gilchrist, Jr., Clerk. [Seal of the District Court of the United States, Southern District of New York.]

Endorsed on cover: File No. 29,547. S. New York, D. C. U. S. Term no. 997. James Shewan & Sons, Inc., appellant, vs. The United States of America. Filed April 11th, 1923. File No. 29,547.

MAR 3 192
WM. R. STANSI

Supreme Court of the United States

OCTOBER TERM—1923.

No. 292.

JAMES SHEWAN & SONS, INC.,
Appellant,

—against—

THE UNITED STATES OF AMERICA.

APPELLANT'S BRIEF.

C. C. CALHOUN,
Proctor for Libelant-Appellant.

GEORGE V. A. McCLOSKEY,
Of Counsel.

The Alpert Press, 138 Livingston St., Brooklyn, N. Y. Tel. Main 1058-1059

Supreme Court of the United States

OCTOBER TERM 1923.

JAMES SHEWAN & SONS, INC., Appellant, —against— THE UNITED STATES OF AMERICA.	No. 292.

APPELLANT'S BRIEF.

STATEMENT.

This appeal is taken from the United States District Court for the Southern District of New York (Hon. Augustus N. Hand, D. J., no opinion), upon a certificate of a jurisdictional question as the basis of its decree dismissing a libel filed May 12, 1922, under the Suits in Admiralty Act (Act of March 9, 1920, c. 95, 41 Stat. at L. 525, printed in full as an appendix) for work, labor and services furnished to the United States Shipping Board steamer Biran in May, 1920, upon the order of the persons in charge of said steamship and upon the credit of the vessel to the extent and value of $903.03, the claim being such as in case of private ownership could be enforced by a proceeding *in rem*. The question is, does the Suits in Admiralty Act confer

jurisdiction of the libel in view of the state of facts recited in the final decree? The final decree embodies the facts as they were agreed upon by counsel for the Government and for the appellant.

The decree, which is styled in the record "order dismissing libel for want of jurisdiction," sets forth as its basis the conceded facts found without the necessity of trial or the production of evidence (fols. 9 and 10): "That on the 11th day of June, 1921, the steamship Biran was laid up in the care and custody of caretakers employed by the United States Shipping Board, in the out of use and laid-up fleet of the United States Shipping Board anchored in the Hudson River near Cornwall, New York, within the Southern District of New York, and so remained at and ever since the time when the libel was filed herein, and that ever since said 11th day of June, 1921, the said steamship Biran has carried neither crew nor cargo, nor been the subject of any operating agreement for use in the merchant or other service, nor been transferred by the United States Shipping Board to any other department or agency of the Government of the United States."

These facts with some intermingled conclusions had been made the basis of exceptive allegations by the Government, which also excepted upon the ground that in the libel it was not alleged (in terms) that, at the date of the filing of such libel herein, the steamship Biran was employed as a merchant vessel, the libel having alleged in its second article "that the steamship Biran is owned by the United States of America and at all the times herein mentioned was engaged in mercantile trade." The words "engaged in mercantile trade" are doubtless equivalent to the language of the Statute "employed as a merchant vessel" (see *Grays Harbor Stevedoring Co. vs. U. S.*, 286 Fed.

111), but in order to avoid a false issue, a question of the phrase of the pleading instead of the substance of the statute, the libel was amended by leave of Court formally recited in the order dismissing the libel so as to make the second article of the libel read: "That the steamship Biran is owned by the United States of America and at all times hereinafter mentioned was employed as a merchant vessel." As among the "times mentioned" in the libel, which speaks as of the time it was filed, are many allegations of present fact, e. g., in the fifth article (fol. 3) that the vessel "is now within the jurisdiction," etc., the amendment even upon the Government's theory of the law, would seem to remove any mere question of pleading from the case. The District Court allowed the Government's exception and exceptive allegation to stand against the amended libel and, in the language of its certificate, treated them "as presenting the question of jurisdiction within the Suits in Admiralty Act of March 9, 1920."

This question of jurisdiction has two phases:

(a) Whether to bring such a suit within the Act it is necessary that a Government-owned vessel employed in the merchant service at the time the services, the subject of the libel, were rendered, should be still in the merchant service at the time of the filing of the libel.

(b) Whether upon the facts set forth in the order of dismissal, a vessel laid up in but not transferred from the merchant service was not still "employed as a merchant vessel" within the meaning of the Act even if construed as referring such employment to the time of filing libel rather than the time a lien would accrue in the case of a vessel privately owned.

POINT I.

THE SUIT IS WITHIN THE SUITS IN ADMIRALTY ACT IRRESPECTIVE OF WHETHER THE BIRAN WAS STILL EMPLOYED AS A MERCHANT VESSEL AT THE TIME OF THE COMMENCEMENT OF THE ACTION.

In the antecedent legislation from which the Suits in Admiralty Act derives the limitation to merchant vessels, in the Shipping Board Act of September 7, 1916, c. 451, §9, 39 Stat. at L. 728, 730, we find the language:

> "Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein."

Obviously that language, particularly the word "liabilities", relates to the creation, not merely to the enforcement, of "liabilities." In *The Lake Monroe*, 250 U. S. 246, 255, answering the contention of the Government that the vessel was not employed solely as a merchant vessel, this Court said:

> "The return, however, makes it clear that *at the time of the collision* she was operating under a charter executed by the agents of the board to a certain coal company * * *" (italics ours.)

In the Suits in Admiralty Act, since enforcement against the vessel is prohibited, since "liability" to seizure does not exist, it is clear that the em-

ployment of the vessel as a merchant vessel conditions the accrual of the cause of action (not its continuance) and distinguishes the case of vessels in the naval or other public service as to which the Government retains immunity.

The Suits in Admiralty Act, as this Court noted in *Blamberg Brothers vs. U. S.*, 260 U. S. 452, was enacted to avoid embarrassment to the Government by arrest and seizure of its merchant vessels under the Act of September 7, 1916, and *The Lake Monroe*, 250 U. S. 246, and substituted for the right *in rem* within the United States and its possessions a proceeding *in personam*. Apart from actual seizure, the analogies of actions *in rem* were largely preserved (*cfde The Isonomia*, 285 Fed. 516). The restriction of the remedy to the case of merchant vessels was also preserved despite an effort to secure its application to the case of other Government-owned vessels (Husted amendment, Congressional Record, vol. 59, part 2, p. 1693, and pp. 1750-1759). In the Suits in Admiralty Act, §2, which is not confined, like §9 of the Act of September 7, 1916, to vessels purchased, chartered, or leased from the Board, the distinction between vessels in the public service and vessels in merchant service (both equally exempt under §1 from arrest or seizure by judicial process) is thus made:

> "That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant ves-

sel or is a tug boat operated by such corporation. * * *"

The intention and effect of the proviso concluding the quoted language can best be judged by considering what the law would mean were the proviso omitted. Without that proviso, a vessel owned by the United States and at the time of the collision, supply, repairs, etc., operated as a public vessel, e. g., as a naval transport, would be within the Act and suit might be maintained *in personam* against the Government upon the principles applicable against a private party. If such is the effect of the Act when read without the proviso, can anything be plainer than this, that the Act incorporates the proviso precisely to avoid that result? The Act, therefore, looks to the character of the vessel as a public vessel or as a merchant vessel at the time of the collision or other transaction originating the claim and draws at that point the line of demarcation between vessels within the Act and those outside of its provisions.

The whole argument for the Government rests upon a verbal gymnastic: it construes the words of Section 2 of the Act: "Provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation" as referring to the time of libel filed. Why? Because it says, the filing of libel is mentioned in the earlier part of the sentence. But the time of filing the libel is referred to in respect of an altogether different subject-matter and in regard merely to the class of cases to which the Act applies. The class of cases is defined as those in which "if such vessel were privately owned or operated or if such cargo were privately owned or possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for."

The proviso following relates to the class of vessels (not of cases) and the requirement of mercantile employment is not commingled as it might have been with the phrase quoted, e. g., had it read "and if at such time such vessel is employed as a merchant vessel," etc. Instead of being so united with the phrase "at the time of the commencement of the action herein provided for," the requirement of mercantile character is divorced therefrom by being put in a proviso modifying everything that precedes but not itself incorporating the same reference to time. Nor can such reference be naturally implied, for it would have been too easy to express, i. e., by inserting the words "at such time" after the words "provided that." Furthermore, such implication is not required by any purpose of the Act, for, as the Act allows a right *in personam* and prohibits seizure *in rem*, the mercantile character of the vessel at the time the libel is filed is irrelevant, while its mercantile character at the time of the transaction out of which the libel arises is all important as distinguishing liability for the acts of mercantile vessels from liability for the acts of public vessels. The whole force of the proviso looks to this distinction and the proviso must therefore be interpreted solely in view of it, for, if the proviso were omitted, the Act would create a liability for the conduct of public vessels. Furthermore, if by some trick of verbalism the mercantile character required by the proviso is to be referred to "the time of the commencement of the action," the absurdity will arise that the Government will be liable for the acts of a public vessel provided that at the time of the commencement of the action she has been converted by the Government to mercantile uses. It is no answer to this to say that under the decision in *The Western Maid*, 257 U. S.

419, no action would lie against a public vessel, for, in The Western Maid, suit was brought under the general maritime law and not under the Statute which is authority for any suit within its terms.* This Court did not have occasion to consider whether Section 2 of the Suits in Admiralty Act would have applied to the case of The Western Maid had suit been brought under that Act. The United States have now declared that suit may be brought under the conditions prescribed in the Act and if the words "provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation" are to be understood as relating "to the time of the commencement of the action," it follows inescapably that the Act will apply to the case of a vessel owned and operated by the United States as a public vessel at the time of collision and owned and operated by the United States as a merchant vessel at the time the libel is filed—a result which is a *reductio ad absurdum* of the Government's argument.

The Government has relied upon certain District Court decisions, but, as we have answered the reasoning upon which they depend, we need consider them further. It is interesting, however, to note that in *Adams vs. U. S.*, 281 Fed. 895, Judge Morton said:

> "Some question is made whether the statute means employed at the time when the accident took place or when suit was brought; but the decision in *The Western Maid*, * * * 257 U. S.

* Note.—In *The Western Maid, supra*, the Suits in Admiralty Act was referred to for one purpose only, counsel for the libelant claiming that, by taking over the defense under Section 4 of the Act, the Government had assumed liability and this Court holding on the contrary that Section 4 did not create a liability where none before existed or require the waiver of any defense otherwise available.

> 119, leaves, I think, not much room for doubt on that point. The statute does not make vessels liable for torts for which suit could not have been brought at the time of the accident."

In *The Tug Vouparcil*, 1924 A. M. C., 312, where the United States contended that there was no jurisdiction under the Suits in Admiralty Act because the steamship at fault had been sold by the United States before the Government was brought into the litigation — in that case by impleader under the 56th Rule in Admiralty — Judge Ward, overruling the contentions of the Government, reasoned out the construction of the statute with much force, saying in part:

> "The first sentence of Sec. 2 is relied upon by counsel for the United States. It can hardly be read as meaning that if the vessel were employed by the United States as a merchant vessel at the time of suit brought, suit should be maintained against the United States, even if it had no interest in the vessel at the time the cause of action arose. Yet, construing the language literally that would be as correct as to say that a suit could not be maintained even if the United States was operating the vessel as a merchant vessel at the time the cause of action arose but was not so operating her when the suit was brought. As vessels of the United States under Sec. 1 of the Act cannot be seized at all in the United States or its possessions it is of no possible materiality how the vessel was being operated at the time of suit brought; while, on the other hand, it must obviously be a condition precedent of the right to maintain a suit that the vessel was being operated by or

for the United States as a merchant vessel at the time the cause of action arose."

The construction for which we contend is consistent with the dominant purpose and distinction present to the mind of Congress and for that reason alone should be preferred to a construction which has no relation to the purpose of the Act except to defeat it by irrelevantly imposing a condition subsequent to the accrual of the cause of action thereby created. As this Court said in *American Express Co. vs. U. S.*, 212 U. S. 522, 534: "a proviso will be given such construction as is consistent with the legislation under construction." See also *U. S. vs. Babbitt*, 1 Black (66 U. S.) 55; *U. S. vs. Scruggs*, 156 Fed. 940, 942; *Georgia R. & B. Co. vs. Smith*, 128 U. S. 174. This is but an application of the principle which this Court stated by Mr. Justice Swayne in *Jones vs. Guaranty, etc., Co.*, 101 U. S. 626: "The intent of the lawmaker is the law." See also *The Schooner Harriet*, 1 Story 256, Fed. Cas. No. 6099.

POINT II.

IF TO BRING THIS SUIT WITHIN THE SUITS IN ADMIRALTY ACT THE BIRAN MUST HAVE BEEN EMPLOYED AS A MERCHANT VESSEL AT THE TIME OF THE COMMENCEMENT OF THE ACTION, SHE WAS SO EMPLOYED UPON THE CONCEDED FACTS EMBODIED IN THE FINAL DECREE.

Prior to the commencement of the action, the Biran was laid up in the care and custody of caretakers employed by the United States Shipping Board in its out of use and laid-up fleet anchored

in the Hudson River near Cornwall, N. Y., within the Southern District of New York, has since so remained and has carried neither crew nor cargo, nor been the subject of any operating agreement for use in the merchant or other service, nor been transferred by the United States Shipping Board to any other department or agency of the United States Government (record, fols. 9, 10).

Contending that, to authorize the suit, the Biran must have been employed as a merchant vessel at the time the suit was commenced, the Government argues that upon those facts she was not so employed inasmuch as she was laid up. We contend that, although laid up in the merchant service, she was none the less "employed as a merchant vessel" within the meaning of the Act, even if the requirement of mercantile employment relates (as the Government urges and we dispute) to the time the libel was filed as distinguished from the time the cause of action accrued.

It is a fact of public notoriety and quite apparent from the course of this legislation through Congress that the terms "employed as a merchant vessel" were designed to exclude from the scope of the Act all vessels in the public service such as naval vessels, coast-guard cutters, lighthouse tenders, etc. It is this great distinction and no petty technicality that Congress had in view.

The phrase "employed as a merchant vessel" used in the Suits in Admiralty Act, is derived from the Act of September 7, 1916, c. 451, §9, 39 Stat. at L. 728, 730. In the Suits in Admiralty Act the language is "employed as a merchant vessel" whereas the verbiage of the earlier Act was "while employed *solely* as merchant vessels" and the difference is significant if not of an enlarged meaning at least of acceptance of a liberal interpretation of the original language. Under the Act of Sep

tember 7, 1916, even though naval officers and crew were aboard the vessel, the nature of the work in which she was engaged was deemed to give her merchant status (*The Jeannette Skinner*, 258 Fed. 768, s. c. 266 Fed. 396), and a like ruling has been made under the Suits in Admiralty Act (*Adams vs. U. S.*, 281 Fed. 895). In *The Lake Monroe*, 250 U. S. 246, 255, 256, this Court said:

> "We cannot accede to the suggestion that the Lake Monroe was not employed 'solely as a merchant vessel,' because she was assigned to the New England coal trade, and because at that time the Government, through the Fuel Administration, was rationing the coal supply of the country. The language of §9, 'such vessels while employed solely as merchant vessels,' must be read in connection with the phrase, 'whether the United States be interested therein, in whole or in part, or hold any mortgage, lien, or other interest therein.' Her service at the time was purely commercial, and she was subject by the terms of the Act to the ordinary liability of a merchant vessel, notwithstanding the indirect interest of the Government in the outcome of her voyage."

By parity of reason the terms "employed as a merchant vessel" must in the present Act be read in the light of the interest of the United States as set forth in Section 1 and the extent of the Government's interest does not negative the mercantile character to which the vessel has been dedicated.

The Government construes the statutory phrase as though it read "*actively* employed as a merchant vessel." Had such been the meaning it would have been easy for Congress to express it and the reason

it was not so expressed either in the Act of September 7, 1916, or in the Act of March 9, 1920, is obviously that Congress had in mind the character assigned to the vessel, not the activity of her use. Is her character that of a merchant vessel? The statute applies. Having been dedicated to the merchant service she may be actively operated or temporarily overhauled or indefinitely laid up in that service; she does not lose its character. She can lose that character only by transfer to another department of governmental action as by transfer to naval or transport service. Laid up, she passes into the reserve of the Government merchant fleet but does not cease to be part of it, as a military officer when out of active service does not cease to be attached to the Army. She may resume active operation whenever freight rates rise or new routes are established, and, when so operated, is not taken from any other service, from any other department of Government, but, without change of control, passes from idleness to activity, being equally in either case a member of the Government's merchant fleet. So long as the vessel has not been transferred to another department and to a different service, she remains a vessel built for trade; she remains subject to continued use in commercial voyages, she remains out of the category of the public service; she remains outside of those considerations which have rendered Congress unwilling to subject its naval ships, its coast guard cutters, etc., to the obligations of its mercantile fleet.

As early as July 20, 1790, Congress passed an Act governing "seamen in the merchant service" and surely such seamen do not cease to be in the merchant service during a lay-up period. It is true of vessels as of men: "They also serve who only stand and wait."

As an argument *ab inconvenienti* and something more, as disclosing a consequence so remote from the intent of Congress as gathered from the Act itself and the history of preceding legislation as to bear strongly against any construction which leads to it, we may note, as a well known historical fact and one appearing from official reports, that for long periods of time the greater part of ~~which~~ the Shipping Board Fleet has been laid up and that, if the laying up of the vessel takes it out of the Act, the Act is greatly confined in its operation and the remedial purpose evinced in the prior Act of September 7, 1916, and necessarily carried forward in the Suits in Admiralty Act which is *in pari materia*, would be largely defeated.

A construction limiting the terms "employed as a merchant vessel" to something less than vessels of merchant class as distinguished from vessels in the public service, will lead to many close questions and to many fine distinctions which could scarcely have been present to the mind of Congress. It is a baleful magic that draws out a simple phrase used in the connection that looks to broad distinctions, a cloud of technicalities. If an indefinite laying up of the vessel takes it out of the Act, does a temporary withdrawal from active operation do so? And if so, does a withdrawal for the purposes of refitting, dry docking and overhauling for future voyages take the vessel out of the Act? And if so, has an interval between voyages, with her crew on board, the like effect? Would it make any difference were the crew discharged? Through these and many other gradations of fact and shades of circumstance the question may be pursued. Where is the line to be drawn if it be once conceded that to place a vessel in the reserve fleet of the Shipping Board is to take her out of the Act?

If a Shipping Board vessel by her sole fault collides with my vessel and is herself so damaged by the collision that she is withdrawn from operation, perhaps indefinitely, am I by construction to be deprived of the remedy of the Act and can anyone think that Congress so intended? Such a case differs only in degree from the case at bar. In the construction of remedial legislation, hardship and absurdity are, from a just respect for the legislative power, to be avoided, not embraced.

POINT III.

THE DECREE UNDER REVIEW SHOULD BE REVERSED, THE LIBEL REINSTATED AND THE DISTRICT COURT DIRECTED TO PROCEED TO DECISION UPON THE MERITS.

Respectfully submitted,

C. C. CALHOUN,
Proctor for Libelant-Appellant.

GEORGE V. A. McCLOSKEY,
Of Counsel.

APPENDIX.

Text of the Suits in Admiralty Act, Act of March 9, 1920, c. 95, 41 Stat. at L. 525.

1. That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: Provided, That this Act shall not apply to the Panama Railroad Company.

2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General

of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

3. That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or such corporation may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder.

Any such bond or stipulation heretofore given in admiralty causes by the United States, the United States Shipping Board, or the United States Shipping Board Emergency Fleet Corporation, shall become void and be surrendered and canceled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause, and assumes liability to satisfy any decree included within said bond or stipulation, and thereafter any such decree shall be paid as provided in section 8 of this Act.

4. That if a privately owned vessel not in the possession of the United States or of such corporation is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such corporation such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release, and assumes the liability for the satisfaction of any decree obtained by the libelant in such cause, and thereafter such cause shall proceed against the United States in accordance with the provisions of this Act.

5. That suits as herein authorized may be brought only on causes of action arising since April 6, 1917, provided that suits based on causes of action arising prior to the taking effect of this Act shall be brought within one year after this Act goes into effect; and all other suits hereunder shall be brought within two years after the cause of action arises.

6. That the United States or such corporation shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels.

7. That if any vessel or cargo within the purview of sections 1 and 4 of this Act is arrested, attached, or otherwise seized by process of any court in any country other than the United States, or if any suit is brought therein against the master of any such vessel for any cause of action arising from, or in connection with, the possession, operation, or ownership of any such vessel, or the possession, carriage, or ownership of any such cargo, the Secretary of State of the United States in his discretion, upon the request of the Attorney General of the United States, or any other officer duly authorized by him, may direct the United States consul residing at or nearest the place at which such action may have been commenced to claim such vessel or cargo as immune from such arrest, attachment, or other seizure, and to execute an agreement, undertaking, bond or stipulation for and on behalf of the United States, or the United States Shipping Board, or such corporation as by said court required, for the release of such vessel or cargo, and for the prosecution of any appeal; or may, in the event of such suits against the master of any such vessel, direct said United States consul to enter the appearance of the United States, or of the United States Shipping Board, or of such corporation, and to pledge the credit thereof to the payment of any judgment and cost that may be entered in such suit. The Attorney General is hereby vested with power and authority to arrange

with any bank, surety company, person, firm, or corporation in the United States, its Territories and possessions, or in any foreign country, to execute any such aforesaid bond or stipulation as surety or stipulator thereon, and to pledge the credit of the United States to the indemnification of such surety or stipulator as may be required to secure the execution of such bond or stipulation. The presentation of a copy of the judgment roll in any such suit, certified by the clerk of the court and authenticated by the certificate and seal of the United States consul claiming such vessel or cargo, or his successor, and by the certificate of the Secretary of State as to the official capacity of such consul, shall be sufficient evidence to the proper accounting officers of the United States, or of the United States Shipping Board, or of such corporation, for the allowance and payment of such judgments: Provided, however, That nothing in this section shall be held to prejudice or preclude a claim of the immunity of such vessel or cargo from foreign jurisdiction in a proper case.

8. That any final judgment rendered in any suit herein authorized, and any final judgment within the purview of sections 4 and 7 of this Act, and any arbitration award or settlement had and agreed to under the provisions of section 9 of this Act, shall, upon the presentation of a duly authenticated copy thereof, be paid by the proper accounting officers of the United States out of any appropriation or insurance fund or other fund especially available therefor; otherwise there is hereby appropriated out of any money in the Treasury of the United States not otherwise appropriated, a sum sufficient to pay any such judgment or award or settlement.

9. That the Secretary of any department of the Government of the United States, or the United States Shipping Board, or the board of trustees of such corporation, having control of the possession or operation of any merchant vessel are, and each hereby is, authorized to arbitrate, compromise, or settle any claim in which suit will lie under the provisions of sections 2, 4, 7, and 10 of this Act.

10. That the United States, and the crew of any merchant vessel owned or operated by the United States, or such corporation, shall have the right to collect and sue for salvage services rendered by such vessel and crew, and any moneys recovered therefrom by the United States for its own benefit, and not for the benefit of the crew, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of the United States Shipping Board, or of such corporation, having control of the possession or operation of such vessel.

11. That all moneys recovered in any suit brought by the United States on any cause of action arising from, or in connection with, the possession, operation, or ownership of any merchant vessel, or the possession, carriage, or ownership of any cargo, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of the United States Shipping Board, or of such aforesaid corporation, having control of the vessel or cargo with respect to which such cause of action arises, for reimbursement of the appropriation, or insurance fund, or other funds, from which the loss, damage, or compensation for which said judgment was recovered has been or will be paid.

12. That the Attorney General shall repo
the Congress at each session thereof the suit
der this Act in which final judgment shall have
rendered for or against the United States and
aforesaid corporation, and the Secretary of
department of the Government of the U
States, and the United States Shipping Board
the board of trustees of any such aforesaid
poration, shall likewise report the arbitr
awards or settlements of claims which shall
been agreed to since the previous session, a
which the time to appeal shall have expired or
been waived.

13. That the provisions of all other Act
consistent herewith are hereby repealed.

No. 42

In the Supreme Court of the United States

OCTOBER TERM, 1924

JAMES SHEWAN & SONS (INC.), APPELLANT

v.

UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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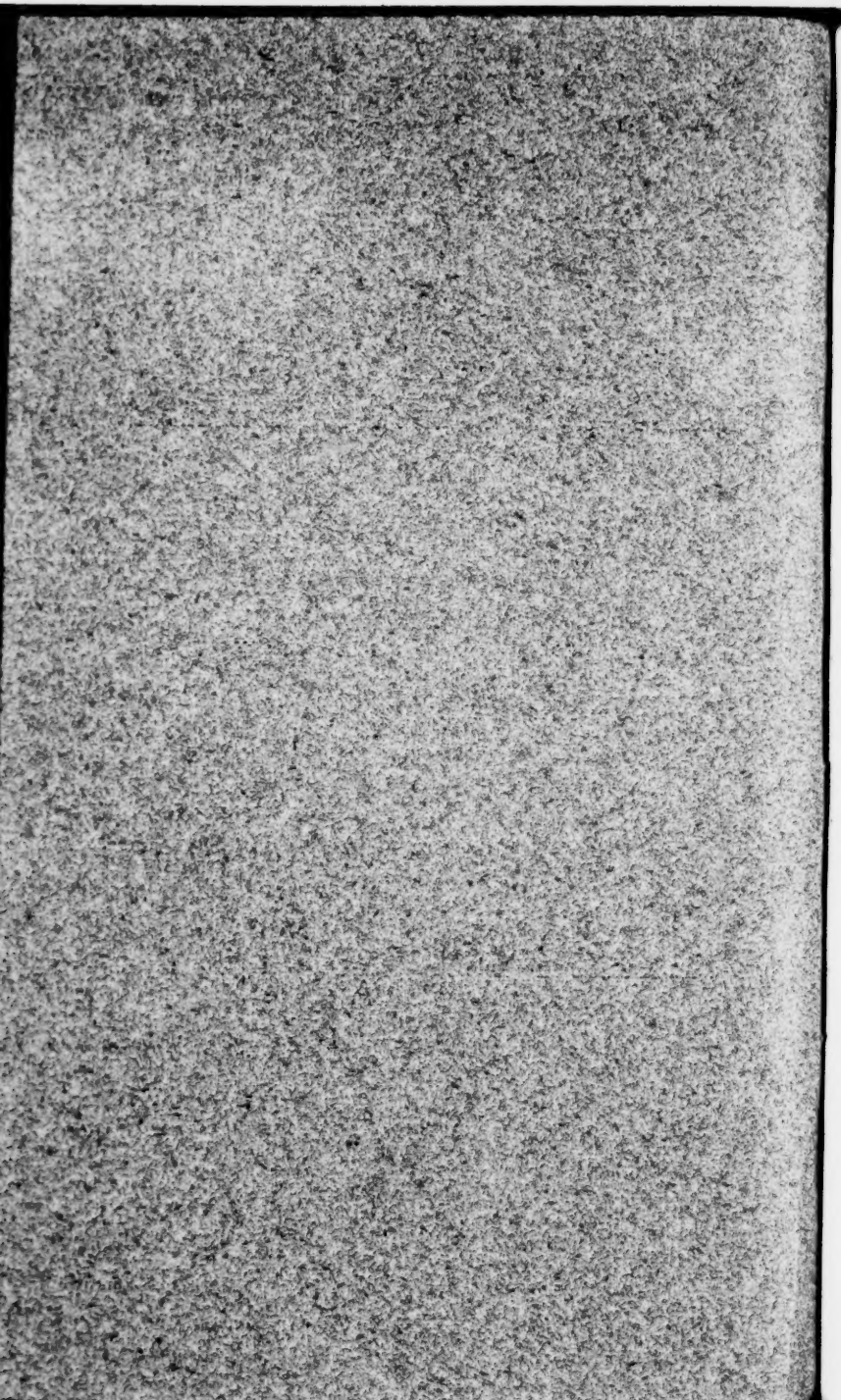

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I

STATEMENT

During May, 1920, James Shewan & Sons (Inc.), made certain repairs to the Steamship *Biran*, amounting to $903.03. The facts determining the status of the steamship at that time are not stated, although the libel alleges she was then employed in merchant service. On June 11, 1921, the *Biran* was withdrawn from merchant service and laid up in the Hudson River, in the care and custody of caretakers employed by the United States Shipping Board and since the *Biran* has carried neither crew nor cargo nor has been the subject of any operating agreement

for use in the merchant or other service. The vessel is owned by the Government.

On May 12, 1922, by assumed authority of the Suits in Admiralty Act of March 9, 1920 (41 Stat. 525), the ship repairer filed its libel against the United States as the owner of the *Biran* to recover its account, asserting the claim upon principles of *in rem* liability. Following the practice approved in the Southern District of New York, the Government filed exceptive allegations (suggestion of want of jurisdiction) stating that as at the time the libel was filed the Steamship *Biran* was not employed as a merchant vessel, the Court was without jurisdiction, as the provisions of the Suits in Admiralty Act must be read to require the vessel to be "employed as a merchant vessel" at the time the libel was filed.

By agreement the status of the *Biran* at the time the libel was filed was that (R. pp. 4, 5):

> * * * on the 11th day of June, 1921, the steamship *Biran* was laid up in the care and custody of caretakers employed by the United States Shipping Board in the out-of-use and laid-up fleet of the United States Shipping Board anchored in the Hudson River near Cornwall, New York, within the Southern District of New York, and so remained at and ever since the time when the libel was filed herein, and that ever since said 11th day of June, 1921, the said steamship *Biran* has carried neither crew nor cargo, nor been the subject of any operating agreement for use in

> the merchant or other service, nor been transferred by the United States Shipping Board to any other department or agency of the Government of the United States.

By authority of the opinion of Judge Learned Hand, in the case of the *Mack Engineering & Supply Company* v. *United States*, 291 Fed. 713, the District Judge (Augustus N. Hand), without opinion, entered a final decree dismissing the libel. From this final decree an appeal has been taken directly to this court.

The jurisdictional question is whether or not Section 2 of the Suits in Admiralty Act must be read to require the Government vessel charged with liability to be employed in merchant service at the time the libel is filed as a condition precedent to the right to maintain a libel under authority of that Act.

II

ARGUMENT

Section 9 of the Shipping Board Act of September 7, 1916, is the antecedent legislation imposing upon Government vessels employed solely as merchant vessels, the laws, regulations, and liabilities governing merchant vessels. The full text reads (Act of Sept. 7, 1916, c. 451, 39 Stat. 728, 730):

> SEC. 9. That any vessel purchased, chartered, or leased from the board, by persons who are citizens of the United States, may be registered or enrolled and licensed, or both registered and enrolled and licensed, as a vessel of the United States and entitled to the

> benefits and privileges appertaining thereto: *Provided*, That foreign-built vessels admitted to American registry or enrollment and license under this Act, and vessels owned by any corporation in which the United States is a stockholder, and vessels sold, leased, or chartered by the board to any person a citizen of the United States, as provided in this Act, may engage in the coastwise trade of the United States while owned, leased, or chartered by such a person.
>
> Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein.

This Court in the *Lake Monroe*, 250 U. S. 246, applied this section. In that case at the time of the filing of the libel as well as at the time of the incurment of the lien liability the *Lake Monroe* was employed solely as a merchant vessel.

In order to obviate delays and losses to Government vessels in merchant service through their attachment and detention and to avoid expenses incident to providing surety bonds to secure their release, certain bills were introduced in Congress which eventually passed as the Suits in Admiralty Act of March 9, 1920 (41 Stat. 525). The Act is a pro-

cedural one. (*Blumberg Bros.* v. *United States*, 266 U. S. 452, 458.)

The applicable provisions of the draft of the original bill read as follows (Congressional Record, Vol. 59, Part 2, page 1678):

> *Be it enacted* * * * That the United States, and any corporation in which the United States owns not less than a majority of the capital stock, may be sued in personam in the district courts of the United States in admiralty for any cause of action of which said courts ordinarily have cognizance in their admiralty and maritime jurisdictions, arising since April 6, 1917, out of or in connection with the possession, operation, or ownership by the United States or such corporation of any merchant vessel, or the possession, carriage, or ownership by the United States or such corporation of any cargo *in those cases where, if the United States were suable as a private party, a suit in personam could be maintained, or where if the vessel or cargo were privately owned and possessed, a libel in rem could be maintained and the vessel or cargo could be arrested or attached at the time of the commencement of suit.* Any such suit shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found, or in the district in or nearest which the cause of action arises. (Italics ours.)

The House Judiciary Committee made certain changes and Sections 1 and 2 of the bill reported by that committee (Congressional Record, Volume 59, Part 2, 66th Congress, Second Session, page 1678) provided:

> That every vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock, or in the possession of the United States or of such corporation, or operated by or for the United States or such corporation, is hereby declared to be a public vessel of the United States and to be immune from arrest or seizure. Any cargo owned and possessed by the United States or by such corporation is hereby declared to be public property of the United States and to be immune from arrest or seizure.
>
> SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained, a libel in personam may be brought against the United States or against such corporation, as the case may be, *provided that such vessel is employed or intended to be employed in the carriage of cargoes or of passengers for hire.* Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. (Italics ours.)

In the House, Section 2 of the Bill was amended to read (Congressional Record, *supra*, p. 1755):

> SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained *at the time of the commencement of the action herein provided for*, a libel in personam may be brought against the United States or against such corporation, as the case may be, *provided that such vessel is employed or intended to be employed in the carriage of cargoes or of passengers for hire*. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. (Italics ours.)

Such were the provisions of the bill as sent to conference, where Section 2 was amended to read as appears in the bill as passed, as follows (id. 3630):

> SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained *at the time of the commencement of the action herein provided for*, a libel in personam may be brought against the United States or against such corporation, as the case may be, *provided that such vessel is employed as a merchant vessel* or is a tugboat operated by such corporation. * * * (Italics ours.)

In explanation of this change, the managers of the conference on the part of the House made the following explanation (id. 3630):

> 2. In Section 2 the words "or intended to be employed in the carriage of cargoes or of passengers for hire" have been stricken out, and the words "as a merchant vessel or as a tugboat operated by such corporation." The effect of this change is to exclude from the scope of the bill certain public vessels not employed as merchant vessels, but that occasionally carry persons and property for hire, and to make certain that tugboats employed as auxiliaries to the merchant fleet are made subject to the proposed act.

A marginal reference to the history of this legislation is made.[1]

The pertinent provisions of Sections 1 and 2 of the Suits in Admiralty Act as finally adopted read:

> *Be it enacted* * * *, That no vessel owned by the United States or by any corporation in

[1] The legislative history of the Suits in Admiralty Act is summarized: The original bill, known as S. 2253, was introduced in the Senate on June 23, 1919, and referred to the Committee on Commerce (66th Congress, 1st sess., Cong. Rec. p. 5869). On July 9, 1919, the same bill was introduced in the House as H. R. 7124 and referred to the Committee on the Judiciary (Cong. Rec. 7538). On August 28, 1919, the Committee on Commerce of the Senate held hearings on S. 2253. See report of hearing before the Committee on Commerce, United States Senate, S. 2253, upon which the committee submitted its report (No. 223, 66th Congress, 1st sess.), by which it reported back a new bill, No. 3076 (Cong. Rec., p. 6017). This bill was debated in the Senate (Cong. Rec., pp. 7317, 7439, 7440), and passed the Senate and was referred to the House and by it referred to the Committee on the Judiciary (Cong. Rec., 7538). The Committee on the Judiciary of the House held hearings on H. R. 7124, serial No. 4, and also on a substitute bill known as the Attorney General's substitute, which

which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no *cargo owned or possessed* by the United States or by such corporation shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided*, That this Act shall not apply to the Panama Railroad Company.

SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be,

hearings are fully reported by serial 8, dated November 13, 1919, of the House Committee on the Judiciary.

On December 12, 1919, the Committee on the Judiciary submitted to the House its report (House Report No. 497), reporting the bill in a different form (Cong. Rec., 66th Congress, 2nd sess., p. 498). This report was debated (Cong. Rec., pp. 1678-1693, 1750-1759). The bill went to conference and the conference report, amending the bill as passed by the House, was reported (Senate Document No. 233) to the Senate (Cong. Rec., p. 3350), and agreed to by the Senate (Cong. Rec., p. 3690, 3691). It was also submitted in the House as H. R. 669 (Cong. Rec., p. 3629), agreed to by the House (Cong. Rec., p. 3631), examined and signed (Cong. Rec., pp. 3864-3885), approved by the President March 9, 1920 (Cong. Rec., pp. 3864-3885), approved by the President March 9, 1920 (Cong. Rec., p. 4068), and became Public Act No. 156 (41 Stat. 525).

The hearings before the Committee on Commerce in the Senate were printed as of Thursday, August 28, 1919, while the hearings before the Committee on the Judiciary of the House were printed, the first hearing being Serial 4, dated August 28, 1919, and the second hearing being known as Serial 8, dated November 13, 1919.

> provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. * * *

Section 2 of the Act as thus approved and enacted related to proceedings to be maintained "*at the time of the commencement of the action* * * * *provided for*," and imposed the condition that the vessel charged with the lien liability then is employed as a merchant vessel. The District Court (Augustus Hand, D. J.), adopting the opinion of Learned Hand, D. J., in the *Mack Engineering Company* v. *United States*, 291 Fed. 713, so construed the Act. The Government urges the Act must be so construed. It is its plain reading. The Act must be construed strictly.

> *Schillinger* v. *United States*, 155 U. S. 163.
> *The Isonomia* (C. C. A., 2nd Cir.), 285 Fed. 516.

Judge Learned Hand in the Mack Engineering Company case (supra, at p. 713) said:

> The language of the statute does not seem to be open to any doubt; the proviso certainly refers to the time of the filing of the libel and not to the time when the wrong occurred. *I should have to make over the statute* were I to refer to any other time than that so clearly defined. (Italics ours.)

In *Bensaude & Co.* v. *United States* (1923 1 A. M. C. at p. 261), Henry A. M. Smith, D. J. (E. D. of South Carolina) made the same ruling. A number of libels have been dismissed following these rulings.

The appellant suggests that the *Biran* was "em-
oyed in merchant service" at the time the libel was
ed. The facts (agreed to) deny this. The status
the vessel (R. p. 4) is:

> * * * on the 11th day of June, 1921, the steamship *Biran* was laid up in the care and custody of caretakers employed by the United States Shipping Board, in the out of use and laid-up fleet of the United States Shipping Board anchored in the Hudson River near Cornwall, New York, within the Southern District of New York, and so remained at and ever since the time when the libel was filed herein, and that ever since said 11th day of June, 1921, the said steamship *Biran* has carried neither crew nor cargo, nor been the subject of any operating agreement for use in the merchant or other service, nor been transferred by the United States Shipping Board to any other department or agency of the Government of the United States.

Section 2 of the bill as sent to conference (*supra*)
ad:

> *Provided*, That such vessel is employed or intended to be employed in the carriage of cargoes or of passengers for hire.

As reported by the conference committee and
nally adopted the clause read:

> *Provided*, That such vessel is employed as a merchant vessel.

A vessel laid up in the out-of-service fleet is not
nployed as a merchant vessel. She is not being

commercially operated. She has been withdrawn from trade. She is laid up in the custody of caretakers. She is not employed as a merchant vessel—she has no employment.

CONCLUSION

It is respectfully submitted the appeal should be dismissed.

JAMES M. BECK,
Solicitor General.
ALBERT OTTINGER,
Assistant Attorney General.
J. FRANK STALEY,
Special Assistant to the Attorney General in Admiralty.

SEPTEMBER, 1924.